

FINAL AWARD ALLOWING COMPENSATION
(Modifying Award and Decision of Administrative Law Judge)

Injury No.: 92-047005

Employee: Bobby Daniels
Employer: Noranda Aluminum, Inc.
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the April 7, 2011, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Discussion

The administrative law judge found the Second Injury Fund liable for 6.4 weeks of permanent partial disability benefits under § 287.220.1 RSMo. Employee filed an Application for Review arguing that the award is insufficient and that the administrative law judge should have considered his preexisting right knee and bilateral carpal tunnel syndrome conditions.

We agree that the administrative law judge erred both in her application of the thresholds and in failing to include all of employee's preexisting disabling conditions in determining the extent of Second Injury Fund liability. The administrative law judge looked at each of employee's preexisting conditions and asked whether, considered in isolation, they met the thresholds for triggering Second Injury Fund liability under § 287.220.1. We believe this is an incorrect application of the thresholds.

Section 287.220.1 makes clear that the 15% threshold applies where the employee suffers from preexisting permanent partial disability referable to "a major extremity injury only." Here, employee did not suffer preexisting permanent partial disability referable to a major extremity injury only, but rather suffered multiple preexisting conditions of ill, so the 15% threshold is not applicable. Rather, we look at all of employee's preexisting disabling conditions, determine the total amount of weeks of preexisting permanent partial disability, and ask whether this amount meets the 50-week "body as a whole" threshold.

We find appropriate and affirm the administrative law judge's findings as to the nature and extent of each of employee's preexisting conditions of ill, including her finding that employee's right knee condition did not amount to a preexisting permanent partial disability. We note employee did not discuss the right knee condition in his brief, or ask that we include it in his suggested calculations of Second Injury Fund liability; combined with the lack of medical records or an expert rating, we are convinced the right knee condition was not serious enough to constitute a preexisting permanent partial disability.

Employee: Bobby Daniels

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Converting employee's preexisting disabilities into weeks of compensation yields the following results: 31 weeks for the right ankle, 21.875 weeks for the left wrist, and 21.875 for the right wrist. The sum of employee's preexisting disabilities is 74.75 weeks. Employee has met the 50-week threshold.

We agree that a 10% load factor is appropriate to represent the synergistic combination of employee's preexisting and primary disabilities. Employee's primary injury resulted in 30% permanent partial disability of the left foot at the 110-week level, or 33 weeks of permanent partial disability. The sum of preexisting and primary permanent partial disability is 107.75 weeks. When we multiply the sum by the 10% load factor, the result is 10.775 weeks.

We conclude that the Second Injury Fund is liable for 10.775 weeks of permanent partial disability benefits.

Award

We modify the award of the administrative law judge as to the extent of Second Injury Fund liability.

The stipulated rate of compensation is \$213.57. The Second Injury Fund is liable to employee for \$2,301.22 in permanent partial disability benefits.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

The award and decision of Administrative Law Judge Maureen Tilley, issued April 7, 2011, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 21st day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Bobby D. Daniels Injury No. 92-047005 &
98-176977
Dependents: N/A
Employer: Noranda Aluminum, Inc.
Additional Party: Second Injury Fund
Insurer: Self
Hearing Date: January 31, 2011 Checked by: MT/rf

SUMMARY OF FINDINGS

1. Are any benefits awarded herein?

Injury No. 92-047005 - Yes.
Injury No. 98-176977 - Yes.

2. Was the injury or occupational disease compensable under Chapter 287?

Injury No. 92-047005 - Yes.
Injury No. 98-176977 - Yes.

3. Was there an accident or incident of occupational disease under the law?

Injury No. 92-047005 - Yes.
Injury No. 98-176977 - Yes.

4. Date of accident or onset of occupational disease?

Injury No. 92-047005 – April 23, 1992
Injury No. 98-176977 – February 26, 1998

5. State location where accident occurred or occupational disease contracted:

Injury No. 92-047005 - New Madrid County, Missouri

Injury No. 98-176977 - New Madrid County, Missouri

6. Was above employee in employ of above employer at time of alleged accident or occupational disease?

Injury No. 92-047005 - Yes.

Injury No. 98-176977 - Yes.

7. Did Employer receive proper notice?

Injury No. 92-047005 - Yes.

Injury No. 98-176977 - Yes.

8. Did the accident or occupational disease arise out of and in the course of the employment?

Injury No. 92-047005 - Yes.

Injury No. 98-176977 - Yes.

9. Was claim for compensation filed within the time required by law?

Injury No. 92-047005 - Yes.

Injury No. 98-176977 - Yes.

10. Was the employer insured by the above insurer?

Injury No. 92-047005 - Yes.

Injury No. 98-176977 - Yes.

11. Describe work employee was doing and how the accident happened or occupational disease contracted:

Injury No. 92-047005 - Employee was attempting to move a large electric motor from its base and drove a fiberglass rod through his left foot.

Injury No. 98-176977 – The employee developed bilateral carpal tunnel syndrome as a result of repetitive work as an electrician.

12. Did the accident or occupational disease cause death?

Injury No. 92-047005 - No.

Injury No. 98-176977 - No.

13. Parts of body injured by accident or occupational disease:

Injury No. 92-047005 – Left foot.

Injury No. 98-176977 – Right and Left upper extremities.

14. Nature and extent of any permanent disability:

Injury No. 92-047005 – See findings.

Injury No. 98-176977 – See findings.

15. Compensation paid to date for temporary total disability:

Injury No. 92-047005 - None.

Injury No. 98-176977 - None.

16. Value necessary medical aid paid to date by employer-insurer:

Injury No. 92-047005 - \$823.90

Injury No. 98-176977 - \$2,041.27

17. Value necessary medical aid not furnished by employer-insurer: N/A

18. Employee's Average Weekly Wage:

Injury No. 92-047005 - \$320.36

Injury No. 98-176977 - \$688.80

19. Weekly compensation rate:

Injury No. 92-047005 - \$213.57 for permanent partial disability.

Injury No. 98-176977 – \$459.20 for permanent total disability and \$278.42 for permanent partial disability.

20. Method wages computation: By agreement.

21. Amount of compensation payable: See findings.

22. Second Injury Fund liability: See findings.

23. Future requirements awarded: None.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Robert Butler.

FINDINGS OF FACT AND RULINGS OF LAW

On January 31, 2011, the employee, Bobby Daniels, appeared in person and by his attorney, Robert Butler, for a hearing for a final award on the two above listed claims. The Second Injury Fund was represented at the hearing by their attorney, Assistant Attorney General Jon Lintner. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, for both cases are set forth below as follows.

UNDISPUTED FACTS: Injury No. 92-047005

1. On or about April 23, 1992, Noranda Aluminum, Inc. was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was a self-insured employer with a third party administrator of Sedgwick Claims Management Services.
2. On or about April 23, 1992, the employee was an employee of Noranda Aluminum Inc. and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about April 23, 1992, the employee sustained an accident arising out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was in excess of that required to reach the maximum PPD rate of \$213.57.
7. The employee's injury is medically causally related to the work injury on or about April 23, 1992.
8. The employer has furnished \$823.90 in medical aid to employee.
9. The employer paid no temporary total disability benefits.

ISSUES:

1. Liability of the Second Injury Fund for permanent partial disability.

UNDISPUTED FACTS: Injury No. 98-176977

1. On or about February 26, 1998, Noranda Aluminum, Inc. was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was a self-insured employer with a third party administrator of Sedgwick Claims Management Services.
2. On or about February 26, 1998, the employee was an employee of Noranda Aluminum Inc. and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about February 26, 1998, the employee sustained an accident arising out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.

6. The employee's average weekly wage was \$688.80, and his rate of compensation is \$459.20 for temporary total disability/permanent total disability and \$278.42 for permanent partial disability.
7. The employee's injury is medically causally related to the work injury on or about February 26, 1998.
8. No medical was furnished by the employer.
9. The employer paid no temporary total disability benefits.

ISSUES:

1. Liability of the Second Injury Fund for Permanent total disability or in the alternative, permanent partial disability

EXHIBITS:

The following Employee Exhibits were offered and admitted into evidence for both cases:

- A. Certified copy of Division of Workers' Compensation Records, including final award regarding primary injury;
- B. Exhibits from primary trial for claim No. 92-047005;
 - a) Emergency Room Records Missouri Delta Medical Center
 - b) Office Notes Ferguson Medical Center
 - c) Dr. Raymond F. Cohen Rating report
- C. Certified medical records of Veterans Affairs Medical Center.
- D. Certified copy of Division of Workers' Compensation records, including Final Award.
- E. Exhibits from primary trial for claim No. 98-176977;
 - a) 8/25/05 Deposition of Dr. Bruce Schlafly.
 - b) Dr. Rickey L. Lents Operative report
 - c) Orthopedic Associates medical Records
 - d) Medical Bills
- ER1 Job Description
- ER2 Areas Worked
- ER3 Medical records of Dr. Patrick Knight
- F. Deposition testimony of vocation expert Timothy G. Lalk.
- G. Certified Medical records of MD Anderson Cancer Center.

FINDINGS OF FACT:

The employee sustained an injury to his left foot on April 23, 1992 (Injury No. 92-047005). The employee had several pre-existing injuries before this injury. The employee was diagnosed with bi-lateral carpal tunnel syndrome on February 26, 1998 (Injury No. 98-176977). In between the two injuries, the employee was diagnosed and treated for melanoma. Below is a chronology of the employee's pre-existing and primary injuries.

Injury 92-047005Pre-existing Injuries

- The employee testified that he injured his right knee while he was in the navy. He stated that he hung by his knee for 45 minutes. He stated that has never been able to stand on his knee for very long. He also stated that there are days when his knee swells and it hurts.
- The employee had a crush injury to his right foot in 1992. The injury was to his first metatarsal of the right foot. The employee's foot was crushed by a generator. He stated he has had two surgeries on his foot because of this injury. The employee was off work for a month.
- In the 1970's, employee was employed by the City of New Madrid as a lineman. This required him to climb poles to work on electrical lines. He began to develop numbness and weakness of his hands.
- Employee testified that after the carpal tunnel releases performed by Dr. Fields, that the pain in his hands improved, however, he complained about loss of grip strength. He describe having difficulties with his job with the City of New Madrid because he was no longer able to climb poles because of loss of grip strength. He had problems pulling wrenches. He liked to restore cars, but found that after the carpal tunnel surgery he was having difficulty holding the paint gun.
- Dr. Cohen performed an examination on the hands on June 6, 1996. He recorded that his exam "revealed well healed scars compatible with the bilateral carpal tunnel surgery. The grip strength was weak at 4/5 and there was distinct sensory loss noted over both median nerves to pain and temperature. "
- Dr. Cohen gave a disability rating of 25% permanent partial disability to both his hands as a result of his prior carpal tunnel releases. Dr. Cohen also gave the employee's right foot a 25% Permanent partial disability rating. Dr. Cohen further opined that the pre-existing carpal tunnel condition combines with the primary work injury to be substantially greater than their individual sum.

Primary Injury

- The accident occurred on April 23, 1992. The employee was removing a motor from a sump pump in a fifteen foot deep pit. The motor was rusted to the pump, and he could not remove it with his hands. The employee tried to kick the pump loose. When he did this, he impaled his foot with a fiberglass rod. The rod stuck completely through his foot and came out the top of his work boot. He could not pull it out. He was immediately taken to the emergency room at the Sikeston hospital.
- Not all the fiberglass was removed at the emergency room. In February 1994, the wound was surgically excised, and all the foreign material was removed.
- As a result of the injury, the employee has pain in his foot. The employee stated that the doctors wanted to remove the middle toe, but he would not let them. He stated that his toe nail would embed into his other toe. He also stated that the pain has lessened.
- On June 6, 1996, the employee had an independent medical evaluation performed by Dr. Raymond Cohen. Dr. Cohen stated that the employee had 25% permanent partial disability of the right ankle, 25% permanent partial disability of the right wrist, 25%

permanent partial disability of the left wrist, and 25% permanent partial disability of the left foot.

- In an independent medical evaluation performed by Dr. Patrick Knight on March 18, 2004, Dr. Knight stated that the impairment rating for the employee's left lower extremity was less than 10% with numbness and tingling being attributed to the melanoma. The employee was later diagnosed with melanoma.
- On November 17, 2004, in a final award hearing, Judge Moroni found 30% disability of the left foot at the 110 week level.

Injury 98-176977

Pre-existing injuries

- As previously stated, the employee had a right knee injury while in the navy, a surgery for bi-lateral carpal tunnel syndrome in 1972, and a crush injury to his right foot in 1992.
- The employee was diagnosed with melanoma cancer in 1995.
- In March 1995, employee was diagnosed with nodular malignant melanoma. He was treated at M.D. Anderson Cancer Center in Texas for this condition. In March 1995, the melanoma was excised with regional metastasis (Employee's Exhibit G, p. 44). He underwent 4 courses of biochemotherapy from July 1995 through October 1995. Each course of biochemotherapy is given over 4-5 days followed by 1-3 days of hydration. These treatments led to nausea, vomiting, diarrhea, weight loss, hair loss, fatigue, anemia (necessitating blood transfusions), hypotension-low blood pressure which led to syncopal episodes (fainting spells) requiring intravenous fluid boluses causing fluid overload and edema, fever, chills, neutropenia-low white blood counts, (requiring extra hospitalization after the first treatment) and thrombocytopenia-low platelet counts. After the fourth course of treatment, employee began suffering from peripheral neuropathy of his lower extremities (Employee's Exhibit G, pp. 44-66).
- The neuropathy resulted from damage to the nerve endings from the toxic side effects of the biochemotherapy. On 10/31/95, "with the last course of biochemotherapy, he had complaint of numbness and cold feet" and sensation of paresthesia in his feet as well (Employee's Exhibit G, p. 49). On 5/29/97 at a follow-up visit with Dr. Gillenwater, he was noted to still have numbness and tingling in his feet and legs (Employee's Exhibit G, pp. 208-210). Dr. Eton, whom the employee saw on the same day stated that the numbness "may adversely affect [sic] his ability to do extremely strenuous work." (Employee's Exhibit G, p. 35). The peripheral neuropathy has never resolved. Employee continued to complain of the leg numbness throughout his visits at the VA in Marion Illinois from 2002-2008 (Employee's Exhibit C). Employee testified that he has loss of sensation below his knee down into his feet. The numbness becomes more pronounced further down the leg into the feet.
- In addition to the neuropathy, the employee had other side effects from the treatment. On November 7, 1995, Dr. Eduardo Diaz, Jr. performed a left modified radical neck dissection and left superficial parotidectomy, with dissection and preservation of the facial nerve (Employee's Exhibit G, pp 45-48). Postoperatively, the employee complained of left shoulder weakness and stiffness with decreased range of motion. He also complained of difficulty with his left temporomandibular joint, blurred vision on the

left and occasional tearing or irritation. Dr. Gillenwater recommended physical therapy for both conditions (Employee's Example G, p. 42).

- On March 11, 1996, Dr. Ann Gillenwater notes complaints of:
“significant mobility problems with his left shoulder. He cannot raise it over the horizontal and has pain and dysfunction of this. He also complains of a deep-seated pain in his left face as well as some anesthesia and paresthesia in the region. He also notes blurred vision in his left eye and also has some worsening depth perception which makes driving difficult.” (Employee's Exhibit G, p. 40).
- Dr. Gillenwater recommended continued physical therapy and a scar revision surgery. The Z-plasty revision was performed on July 22, 1996 by Dr. Stephen Kroll (Employee's Exhibit G, p. 38).
- Employee continued to have complaints of shoulder problems on May 29, 1997 when he seen by Dr. Omar Eton. Employee reported that he still had problems lifting and pulling with his left arm and that he has continued on light duty status (Employee's Exhibit G, p. 208).
- Dr. Eton noted continued muscle weakness in the left shoulder and numbness in his feet (Employee's Exhibit G, p. 35).
- On November 20, 1997, Dr. Eton notes that the employee continues to have residual diminution in his range of motion with his left arm over his head as a consequence of the neck surgery. He notes that Dr. Gillenwater had “previously recommended that he avoid ladder work because of this and we have written a letter to his employer today reemphasizing this point”.
- The employee stated that after his cancer related surgeries, he has problems with his speech, he has dry eyes and has to add liquid tears to his eyes on a daily basis, and he has little feeling from the knees down and almost no feeling at all in both legs. He also stated that he sometimes stumbles and falls because his knees give out on him. The employee also stated that he needs cruise control because he can't hold the accelerator down.
- Employee also testified about a long standing battle with depression which he related primarily to his dealing with issues surrounding cancer. He testified that his dispute with Noranda over the payment of his cancer care (which they did not pay for) caused him to have a lot of anger and depression. On March 5, 1999, Dr. Bernard Burns on exam reports “He has marked problems with mood liability. Low mood, thoughts of despair with some suicidal ideation but no intent. He reports his son has kept him from believing this to be a valid option. There is some anhedonia as well as hopelessness” (Employee's Exhibit C). Dr. Burns recorded the prior problems with Zolofl causing dizziness. He recommended that the employee visit Dr. Jordan regarding adjustment disorder, coping skills plus a pain patient survey. Employee did continue to see Dr. Burns and Dr. Jordan and noted some improvement with these conditions after treatment. However, he continued to fluctuate with his mood and coping skills. At trial, employee complained of continuing problems with his mood and depression.

Primary Injury

- The employee returned to work at Noranda in August 1996 (after cancer treatment). He was assigned to the Electric Shop. As part of his duties in the electric shop, the employee was required to repair heating and air conditioning units that were brought into the shop from cranes. The “tear down” and repair would typically take three days, and required the use of ratchets, wrenches and other tools.
- In the later part of 1997 or early in 1998, the employee started developing numbness and tingling with loss of grip strength in both hands. During this time the employee testified he was working exclusively in the electric shop, and was doing more work with his hands than he had ever done before.
- On February 26, 1998, the employee sought treatment from Dr. Ricky Lents. Dr. Lents diagnosed bilateral carpal tunnel. Dr. Lents performed a left carpal tunnel release on March 19, 1998 and a right carpal tunnel release on May 4, 1998.
- Dr. Lents’ records indicate the employee was off work for his left carpal tunnel from March 4, 1998 through March 30, 1998. For the right carpal tunnel, the employee was off of work from April 20, 1998 through May 18, 1998.
- Dr. Lents’ records also indicate that after the employee was diagnosed with bilateral carpal tunnel syndrome, the employee was diagnosed with a possible rotator cuff tear. The employee eventually underwent a mini open rotator cuff repair. There has not been any evidence presented that suggests that the employee’s right shoulder rotator cuff problems existed before the employee was diagnosed with bilateral carpal tunnel syndrome. The employee also underwent an excision of a mass on his forearm, under the care of Dr. Lents. This was also after the employee was diagnosed with bilateral carpal tunnel syndrome.
- The employee testified that he has had continued pain in his hands because of the carpal tunnel syndrome. He stated that the pain is actually worse after the two surgeries in 1998.
- On June 6, 1996, the employee had an independent medical evaluation performed by Dr. Raymond Cohen. Dr. Cohen stated that the employee has a 25% permanent partial disability of the right ankle, 25% permanent partial disability of the right wrist, 25% permanent partial disability of the left wrist, and 25% permanent partial disability of the left foot. Dr. Cohen also stated that the employee’s pre-existing conditions combine with the primary work-related injury to be substantially greater than their individual sum.
- As previously stated, Dr. Patrick Knight examined the employee on December 2, 2003. Dr. Knight agreed the employee had significant range of motion impairment as a result of his bilateral carpal tunnel syndrome, but concluded that his impairment was “a result of his pre-existing carpal tunnel syndrome that has been present since 1972”. Based on his review of the employee’s job description at Noranda, Dr. Knight stated “it would be unlikely that the job at Noranda significantly contributed to the pathology in his hands”. Dr. Knight added that “his current condition is a result of his long standing bilateral carpal tunnel syndrome, as well as peripheral neuropathy from his chemotherapy treatment” (Employer’s Exhibit 3). Dr. Knight, however, made no reference to any medical records or medical history that indicated that the employee was experiencing any symptoms of numbness or tingling in his hands after his carpal tunnel release in 1972 or during the time he was receiving chemotherapy treatment.

- The employee testified that he was placed on medical leave and disability retirement in August of 1998.
- Dr. Bruce Schlafly examined employee on February 17, 2004. Dr. Schlafly diagnosed the employee as having “disability in his hands related to the carpal tunnel, median nerves and flexor tendon function, and he had a history of bilateral carpal tunnel releases and repeat bilateral carpal tunnel releases.” Dr. Schlafly testified that the employee’s work at Noranda was “the substantial factor and the cause of the recurrent bilateral carpal tunnel syndrome, and the need for repeat bilateral carpal tunnel releases.”
- Dr. Schlafly opined that the employee had a 20% permanent partial disability of the body as a whole on the basis of the malignant melanoma, subsequent surgery, chemotherapy treatments and lower extremity peripheral neuropathy. Dr. Schlafly also rated the employee’s right shoulder, however the right shoulder injury occurred after the primary injury and therefore that rating is irrelevant.
- Dr. Schlafly rated the employee as having a 25% permanent partial disability of each hand measured at the level of the wrist joint from work related bilateral recurrent carpal tunnel syndrome and repeat carpal tunnel releases. He also gave permanent hand restrictions of no overhead use of arms; no climbing ladders; and no repetitive gripping, pulling, or lifting with his hands. He limited the employee to lifting 10 pounds with each hand on an occasional basis, and he did not believe the employee was fit for any duty that required the use of power tools.
- Dr. Schlafly stated that the employee now has a combination of disabilities that creates a synergistic effect between the disabilities of his hands, right shoulder, feet, and body as a whole, giving a combined effect greater than the simple sum of the components. These disabilities create a hindrance or obstacle to employment. Once again, Dr. Schlafly includes the employee’s left shoulder, which is an injury that occurred after the primary injury.
- Dr. Bruce Schlafly testified that from an orthopedic standpoint that the employee “cannot climb up and down ladders. He can no longer perform repetitive gripping, pushing, pulling and lifting with his hands. He is limited to lifting 10 pounds with each hand on an occasional basis, and he is not fit for duty that requires use of power tools. He cannot do work that requires him to maintain his balance on heights or uneven surfaces.” (Employee’s Exhibit E, subpart A. p. 11). Dr. Schlafly stated that the employee “may be” permanently totally disabled. Dr. Schlafly indicated that he would defer to a vocational counselor regarding the issue of total disability.
- On September 12, 2007, the employee met Mr. Timothy Lalk for a vocational rehabilitation evaluation. Mr. Lalk noted, “Mr. Daniels was suspicious at the interview and tended to be argumentative. He repeatedly claimed that he was giving me true information even though I had not questioned its authenticity.”
- Employee told Mr. Lalk he was unwilling to work at any job unless he would earn as much as he earned as an electrician.
- Mr. Lalk reached the conclusion, if he assumed the restrictions of Dr. Schlafly, the employee would be capable of performing unskilled entry-level work such as sales work, or work as a security guard, information clerk, desk clerk, cashier, or other type of customer service representative position. Although Mr. Lalk offered another opinion based upon information from Dr. Leventhal, this information is not in evidence (Dr.

Leventhal apparently saw the employee for a second opinion for an injury that occurred after the primary injury).

- On May 31, 2006, the employee had a final award hearing in front of Judge Jack Knowlan. Total disability arising from the carpal tunnel condition was denied but an award for 15% permanent partial disability was awarded for the right and left hands plus a 15% multiplicity. The 15% is attributable to the February 26, 1998 claim for recurrent carpal tunnel syndrome, and does not include a determination of the employee's pre-existing disability.
- During cross examination, the employee became upset and stated "What the hell is wrong with this system? Now you want to see an attitude problem? I can have one." A recess was taken. After the recess, the employee was able to continue testifying. It was apparent that the employee had a difficult time emotionally with the hearing process.

APPLICABLE LAW:

- The test for finding the Second Injury Fund liable for permanent partial disability benefits is set forth in Section 287.220.1 RSMo as follows:

"All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a pre-existing permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment if the employee becomes unemployed, and the pre-existing permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no pre-existing disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the

degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.”

- The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employee at the time of the last injury is liable is less than compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the “Second Injury Fund” hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.

- Section 287.020.7 RSMo. provides as follows:

The term “total disability” as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.

- The phrase “the inability to return to any employment” has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App.1992). The test for permanent total disability is whether, given the employee’s situation and condition, he or she is competent to compete in the open labor market. *Reiner v Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App.1992). Total disability means the “inability to return to any reasonable or normal employment”. *Brown v Treasurer of the State of Missouri*, 795 S.W.2d 479, 483 (Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person’s physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner* at 365. See also *Thornton v Haas Bakery*, 858 S.W.2d 831,834 (Mo.App.1993).

RULINGS OF LAW:***Issue 1. Permanent partial disability, Injury No. 92-047005***

The employee testified that he injured his right knee while he was in the navy. However, there was not a rating of permanent partial disability to the right knee in the evidence presented. Furthermore, there were not medical records presented regarding this injury. Therefore, I find that there was not sufficient evidence to make a determination of permanent partial disability regarding the employee's right knee.

The employee testified that in 1992 he had a crush injury to his right foot. Dr. Cohen opined that the employee had 25% permanent partial disability of his right ankle because of this injury. Based on the evidence presented, I find that the employee sustained 20% permanent partial disability of the right ankle at the 155 week level from this injury.

The employee testified that in the 1970's, he had carpal tunnel releases performed. The employee testified that his hands improved after the carpal tunnel releases however, he still had loss of grip strength. Dr. Cohen opined that the employee had 25% permanent partial disability in both hands as a result of these carpal tunnel releases. Based on the evidence presented, I find that the employee sustained 12½% permanent partial disability in both hands at the 175 week level from his prior carpal tunnel releases. This does not meet the statutory threshold for Second Injury Fund liability. Therefore, the Second Injury Fund is not liable for permanent partial disability regarding the employee's previous carpal tunnel releases.

The employee testified regarding the effects of his 1992 crush injury to his left foot. Dr. Cohen opined that the employee sustained 25% permanent partial disability to his left foot. In a final award hearing, Judge Moroni found that the employee sustained 30% permanent partial disability of the left foot at the 110 week level. Based on the evidence presented, I find that the employee sustained 30% permanent partial disability at the 110 week level of the left foot from this injury.

After considering all of the evidence, I further find that employee's pre-existing injury referable to his right foot with the primary injury to his left foot combined synergistically to create a total disability of 70.40 weeks. This total disability is based on a loading factor of 10%. After deducting the percentage of disability that existed prior to the primary injury (33 weeks) and the disability resulting from the primary injury considered alone (31 weeks) from the total disability attributable to all injuries or conditions existing at the time of the primary injury (64 weeks), the remaining balance to be paid by the Second Injury Fund is equal to 6.4 weeks. The Second Injury Fund is therefore directed to pay to the employee the sum of \$213.57 per week for 6.4 weeks for a total award of permanent partial disability equal to \$1,366.85.

Issue 1. Permanent total disability, Injury No. 98-176977

The employee failed to provide a medical opinion of permanent total disability.

Dr. Schlafly opined that the employee may be permanently and totally disabled, but does not actually state that he is permanently and totally disabled. Dr. Schlafly then deferred to the opinion of a vocational expert on the issue of whether the employee is employable in the open labor market.

Mr. Lalk, a vocational expert, reached the conclusion, if he assumed the restrictions of Dr. Schlafly, the employee would be capable of performing unskilled entry-level work such as sales work, or work as a security guard, information clerk, desk clerk, cashier, or other type of customer service representative position. Mr. Lalk opined the employee was unemployable when Dr. Leventhal's records are considered, however, those records were not submitted for consideration. Dr. Leventhal was a doctor that gave a second opinion regarding a subsequent right shoulder injury.

Based on all of the evidence presented, I find that the employee has failed to meet his burden of proof that the employee can't compete in the open labor market. Therefore, I find that the employee has failed to meet his burden of proof that he is permanently and totally disabled. Therefore, the employee's claim for permanent total disability has been denied.

Issue 2. Permanent partial disability

Based on the evidence presented, I find that the employee sustained 20% permanent partial disability to his right foot at the 155 week level for a 1992 crush injury.

Based on the evidence presented, I find that the employee sustained 30% permanent partial disability at the 110 week level for the April 23, 1992 injury to his left foot.

Dr. Schlafly opined that the employee had a 20% permanent partial disability of the body as a whole on the basis of the malignant melanoma, subsequent surgery, chemotherapy treatments and lower extremity peripheral neuropathy. The employee also testified regarding the effects the melanoma had on his body. The employee stated that after his cancer related surgeries, he has problems with his speech, he has dry eyes and has to add liquid tears to his eyes on a daily basis, and he has little feeling from the knees down and almost no feeling at all in both legs. He also stated that he sometimes stumbles and falls because his knees give out on him. The employee also stated that he needs cruise control because he can't hold the accelerator down. Based on the evidence presented, I find that the employee has sustained 30% permanent partial disability to the body as a whole referable to malignant melanoma, subsequent surgery, chemotherapy treatments and lower extremity peripheral neuropathy.

The employee testified that he has problems with depression. Furthermore, Dr. Bernard Burns noted "He has marked problems with mood liability. Low mood, thoughts of despair with some suicidal ideation but no intent. He reports his son has kept him from believing this to be a valid option. There is some anhedonia as well as hopelessness". He recommended that employee visit Dr. Jordan regarding adjustment disorder, coping skills plus a pain patient survey.

Employee did continue to see Dr. Burns and Dr. Jordan and noted some improvement with these conditions after treatment.

It was clear from the employee's behavior at the hearing that he clearly has some emotional problems. During the hearing the employee stated he could have an "attitude problem". A recess was then taken. Although it is clear that the employee has issues with depression and mood disorder, there has not been a doctor's rating offered into evidence. Based on all of the evidence presented, I find that the employee has 10% permanent partial disability referable to depression and mood disorder. This does not meet the statutory threshold. Therefore, the Second Injury Fund is not liable for permanent partial disability regarding the employee's depression.

The employee testified regarding the primary injury, bilateral carpal tunnel syndrome. The employee stated that the surgeries did not help his carpal tunnel syndrome. Dr. Schlafly rated the employee as having a 25% permanent partial disability of each hand measured at the level of the wrist joint from work related bilateral recurrent carpal tunnel syndrome and repeat carpal tunnel releases. He also gave permanent hand restrictions of no overhead use of arms; no climbing ladders; and no repetitive gripping, pulling, or lifting with his hands. He limited employee to lifting 10 pounds with each hand on an occasional basis, and he did not believe the employee was fit for any duty that required the use of power tools.

On a final award hearing, Judge Mike Moroni awarded the employee 15% permanent partial disability for the right and left hands plus 15% multiplicity attributable to the February 26, 1998 claim for recurrent carpal tunnel syndrome. Based on all the evidence presented, I find that the employee has sustained 15% permanent partial disability at the 175 week level attributable to the February 26, 1998 carpal tunnel syndrome.

After considering all of the evidence, I further find that employee's pre-existing injury referable to his right foot, left foot, and body as a whole (melanoma related problems) with the primary injury to his right and left hands combined synergistically to create a total disability of 271.98 weeks. This total disability is based on a loading factor of 15%. After deducting the percentage of disability that existed prior to the primary injury (184.00 weeks) and the disability resulting from the primary injury considered alone (52.50 weeks) from the total disability attributable to all injuries or conditions existing at the time of the primary injury (236.50 weeks), the remaining balance to be paid by the Second Injury Fund is equal to 35.48 weeks. The Second Injury Fund is therefore directed to pay to the employee the sum of \$278.42 per week for 35.48 weeks for a total award of permanent partial disability equal to \$9,878.34.

ATTORNEY'S FEE

Robert Butler, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Employee: Bobby D. Daniels

Injury No. 92-047005 & 98-176977

Date: _____ Made by:

Maureen Tilley
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation